No. 07-95

In the Supreme Court of the United States

COMPAQ COMPUTER CORPORATION,
Petitioner,

v.

STEPHEN GRIDER and BEVERLY L. GRIDER,
Individually and on Behalf of Those Similarly Situated,
Respondents.

On Petition for a Writ of Certiorari to the Court of Civil Appeals of Oklahoma

REPLY BRIEF FOR PETITIONER

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PARTIES TO THE PROCEEDINGS

The caption includes all parties to the proceedings.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Hewlett-Packard Company ("HP") is the successor by merger to Petitioner Compaq Computer Corporation. HP has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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Respondents fail to address the fundamental legal issues presented in Compaq's petition. Rather, they challenge this Court's jurisdiction and launch a series of unfounded accusations against Compaq.[1] Neither tactic undermines the need for, and propriety of, review at this time.

1. The Court has jurisdiction to review the decision below.

The Court need not await the completion of any additional proceedings in the Oklahoma state courts before granting review. Respondents contend that review of the Oklahoma Court of Civil Appeals' decision should await the completion of all proceedings in state court and argue that review is not proper at this stage under 28 U.S.C. § 1257(a). Opp. 7. That contention is incorrect, and contrary to this Court's decisions.

Although this Court has ruled that § 1257(a) creates a "firm final judgment rule," *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997), the Court also has recognized that "whether a ruling is 'final' . . . is frequently so close a question that decision of that issue either way can be supported with equally forceful words." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964). In the Court's words, "it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality." *Id.* For this reason, the Court consistently has refused to administer the finality requirement "in such a mechanical fashion," *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975), and instead has insisted that "finality" be given a "practical rather than a technical construction." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

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[1] For instance, respondents assail Compaq's alleged decision to "knowingly ship a product with a 'major feature not working.'" Opp. 3. Although this is not the place for an extended discussion of the merits, it bears mention that respondents' experts have never been able to generate the alleged defect at issue through the normal use of a computer, and the Griders themselves used their computer for more than two years without complaining to Compaq about any alleged defects.

Consistent with this practical approach, and contrary to respondents' suggestion, whether the decision below technically is "interlocutory" does not determine whether the ruling is "final" for purposes of review in this Court.[2] *See, e.g.*, *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 346 (1985) ("In neither case was there any basis to believe that the interlocutory holding of unconstitutionality was anything but final."). Indeed, the Court "recurringly" has granted review in cases "in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox Broadcasting*, 420 U.S. at 477.

In *Cox Broadcasting*, the Court explained that there "are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." 420 U.S. at 477. The fourth such category consists of cases

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 482-83. In such cases, although further state-court proceedings are expected, "the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.* at

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[2] As respondents concede, Oklahoma state law expressly provides that class certification decisions are appealable as of right. 12 Okla. St. § 993(6) (2007).

483. The Oklahoma Court of Civil Appeals' decision here aptly fits this fourth category.

The choice-of-law and class certification questions have been finally resolved by the Oklahoma courts. As a result, the case is now proceeding to trial as a nationwide class action involving 1.7 million plaintiffs asserting claims under Texas law. If Compaq prevails on the merits, there will be no opportunity for this Court to review Compaq's challenge to the Oklahoma courts' application of Texas law. Although paying lipservice to the *Cox Broadcasting* exceptions, respondents wrongly suggest that this Court should deny review precisely because Compaq could prevail on the merits, and thus "further proceedings could moot any federal question that might exist." Opp. 11. To the contrary, as *Cox Broadcasting* makes clear, a state court decision will be treated as final where there are "further proceedings pending [in state court] in which the party seeking review here *might prevail on the merits* on nonfederal grounds, thus *rendering unnecessary review of the federal issue by this Court . . . .*" 420 U.S. at 477 (emphasis added).

In the event that plaintiffs prevail, Compaq potentially could be forced to wait years until all state proceedings are completed before seeking review of a decision that is effectively final now, an outcome that is inconsistent with the Court's practice in such cases. *Cox Broadcasting*, 420 U.S. at 477 (holding that review is appropriate "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"). Indeed, in deciding the question of finality, the Court has declared that the most important competing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). In this case, the inconvenience and cost of granting review at this juncture are minimal when compared to forcing the parties to await the conclusion of trial before seeking

review, especially considering that the question presented for review involves the improper certification of a nationwide class action involving 1.7 million plaintiffs. *See Gillespie*, 379 U.S. at 153 ("the eventual costs . . . will certainly be less [if the Court resolves] the questions presented here rather than send the case back with those issues undecided"). Forcing Compaq to proceed to trial in a nationwide class action being prosecuted under Texas law after the Texas Supreme Court already has declared that such a class cannot be maintained under Texas law thus would "work a great injustice." *Id.* Accordingly, "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice[.]'" *Cox Broadcasting*, 420 U.S. at 477-78 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

2. Contrary to respondents' assertion, the Oklahoma courts' choice-of-law ruling presents a true constitutional issue that warrants this Court's review.

There is no basis for respondents' assertion that review should be denied because the Oklahoma courts' choice-of-law ruling does not present "a true Constitutional issue." Opp. 11. The Oklahoma courts failed to conduct the type of conflict-of-laws inquiry required under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Relying on Justice Stevens' concurring and dissenting opinion in *Shutts*, respondents contend that, "in the absence of a demonstration of an *unambiguous* conflict in the established laws of connected states, state-court choices of law are not reviewable." Opp. 11 (emphasis added). The Court in *Shutts*, however, did not adopt Justice Stevens' description of the sort of conflict of laws required to state a constitutional claim. 472 U.S. at 817-18.

In any event, that material conflicts exist cannot be seriously questioned. In conducting its choice-of-law inquiry, the Texas Supreme Court concluded in *Compaq Computer Corp. v. LaPray*, 135 S.W.3d 657 (Tex. 2004) (App. G), that significant and material conflicts exist among the various state laws that could be applied, especially regarding the

standards for warranty notice and reliance, and also the remedies available to plaintiffs. App. 71a-83a. As the petition made clear, the conflicts identified by the Texas Supreme Court do not present "false conflicts" under *Shutts*. *See* App. 73a, 82a. The Oklahoma court's decision to apply Texas law to the claims of the entire class thus presents a true constitutional issue, which warrants review at least as much as the decision in *Shutts* itself did.

3. The Full Faith and Credit Clause is not limited to "final judgments."

In an action brought on behalf of an identical putative nationwide class, raising identical claims, and resting on a nearly identical record, the Texas Supreme Court concluded that Texas law could not govern the claims of non-Texas members of the alleged class. The refusal by the Oklahoma courts to accept and follow that conclusion is contrary to the Full Faith and Credit Clause and its implementing statute. Respondents contend that full faith and credit is due only to "final judgments," and thus, because the Texas Supreme Court's ruling assertedly is a "procedural" decision, it deserves no such deference. Opp. 14-15. That is not correct.

In the first place, the Texas Supreme Court's decision is a final judgment in the only way that matters: it finally resolved the appropriate reach of Texas law and the viability of a nationwide class under Texas law. The fact that it did not resolve the merits of the underlying breach of warranty claims does not mean that the Texas Supreme Court's judgment was not final. Moreover, the Texas Supreme Court's decision is an authoritative interpretation of Texas statutory law. App. 83a. Accordingly, *LaPray* is entitled to full faith and credit in both respects.

In any event, although many of this Court's Full Faith and Credit decisions have involved final judgments, the Court never has held that *only* such judgments are entitled to deference. In fact, the plain language of the Full Faith and Credit Act mandates that the "judicial proceedings" of any

State—not only "final judgments"—"shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. Whether *LaPray* is a final judgment or not, Texas still has "an interest in preserving the integrity of what it ha[s] done." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 284 (1980) (plurality opinion).

4. Compaq's petition correctly characterized the holding of *LaPray*.

Relying on the Oklahoma Court of Civil Appeals' misreading of *LaPray*, respondents argue that Compaq "seriously overstates" the Texas Supreme Court's holding because the Court's choice-of-law analysis was "pure *dicta*." Opp. 5, 4. That claim is unsupportable. Indeed, even a cursory reading of *LaPray* makes clear that the Texas Supreme Court unequivocally *held* that:

> while Texas law will apply to claims by most of those who bought computers in this state, the class representatives have failed to demonstrate it will apply to the claims of out-of-state class members. The differences in state law outlined above cannot be concealed in a throng. *The trial court abused its discretion, therefore, in holding that Texas law bore the most significant relationship to, and therefore governed, all class members' claims.*

App. 85a (emphasis added). Given the plain language of the decision, it cannot seriously be disputed that the Texas Supreme Court determined—not as dicta, but as a central element of its decision—that Texas law could not govern all class members' claims. Nor does the Court's determination that plaintiffs "have failed to demonstrate" that Texas law applies to the claims of non-Texas plaintiffs indicate that *LaPray* turned on mere evidentiary issues. Rather, the Texas Supreme Court simply declared that plaintiffs failed to carry their burden to demonstrate that Texas has a recognizable interest in such claims. That plaintiffs bear this burden does not change

the fact that the Texas Supreme Court *concluded* that Texas law would not apply to such claims. Indeed, the entire tenor of the Court's choice of law analysis is to treat Texas warranty law as animated by a policy of compensation rather than deterrence, which is why there is no hint that the location of the seller's headquarters has any significance under Texas law. Moreover, this argument also ignores the fact that, as respondents concede, the evidentiary record in both the Texas and Oklahoma actions was nearly identical. *See* Pet. 8; Opp. 6. Thus, even if *LaPray* turned on evidentiary issues, there was no basis in the record for the Oklahoma courts to reach a different conclusion.

5. Oklahoma should have respected and deferred to Texas's interest here.

The touchstone of this Court's Full Faith and Credit decisions is the "state interests" analysis. *See, e.g., Shutts*, 472 U.S. at 821-22. Although the Full Faith and Credit Clause does not oblige a state to subordinate its interest in applying its own law to an action, it also does not tolerate one state disregarding the decisions of another state's courts, especially where the decision expresses that state's interest in *limiting* the application of its laws. Respondents fail to demonstrate that Oklahoma has any interest in having Texas law apply to the claims of the nationwide class, or that Oklahoma's interest somehow would be subverted by applying the law of another state, or even the law of several states. Nor could they, as Oklahoma has no such interest.

Although this issue touches on the respect and deference that should be accorded to the interest of a sister state, this is not merely an issue of comity as respondents suggest. Opp. 25. Where, as here, the highest court of a state announces the proper application of that state's own laws in a particular action and as applied to a particular set of claims, that state has a constitutionally significant interest in ensuring that such pronouncements are respected. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 781 (1988). Oklahoma, by contrast, has no

competing interest that could support its refusal to follow the Texas Supreme Court's decision as to the proper reach of Texas law.

6. The Oklahoma courts should have been precluded from reconsidering the class certification issue.

As the petition made clear, the decision by the Oklahoma courts to certify a nationwide class in this case despite the fact that Texas already had determined that such a class could not be maintained under Texas law necessarily rests on the premise that "the class certification exercise is a one-way ratchet: representative plaintiffs can attempt any number of times to certify a nationwide class until they finally succeed in some state." Pet. 16. This is not, nor should it be, the law.[3] Respondents provide no answer as to why plaintiffs that are dissatisfied with a class certification ruling in one forum should be permitted simply to reassert the same claims in subsequent forums until they are able to obtain a favorable class certification ruling. Nor do respondents provide any

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[3] This is especially true here because the issue preclusive effect of the decision in *LaPray* has a constitutional dimension. As a judicial determination by the highest court of the State of Texas regarding the proper application of Texas law to the claims of non-Texas claimants in this action, *LaPray* undoubtedly is entitled to issue preclusive effect in Texas. Accordingly, *LaPray* should be entitled to that same effect in any subsequent action involving the same putative class and raising the same claims, even if plaintiffs assert their claims in another state. As this Court has made clear, a decision of the courts of a sister state "'should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced.'" *Thomas*, 448 U.S. at 270 (plurality opinion) (quoting *Hampton v. McConnel*, 16 U.S. (3 Wheat.) 234, 235 (1818)). This is another reason why respondents' assertion that *LaPray* is not entitled to full faith and credit because it is not a "final judgment" is mistaken, as issue preclusion does not depend on a final judgment. *See In re: Bridgestone/Firestone, Inc. Tires Prods. Liabl. Litig.*, 333 F.3d 763, 767 (7th Cir. 2003) ("claim preclusion (res judicata) depends on a final judgment, [but] issue preclusion (collateral estoppel) does not").

justification as to why our federal system should permit such an outcome.

Rather than responding to the fundamental issue, respondents instead devote their efforts to asserting that this case "is not the appropriate venue in which to resolve some asserted conflict among the Circuits." Opp. 18. Contrary to respondents' suggestion, however, whether the prior denial of class certification precludes unnamed class members from seeking to relitigate that issue in another forum was precisely the issue "laid at the doorstep" of the Oklahoma courts, and thus a fundamental question presented here. Because this Court has yet to address the issue directly, however, serious uncertainty exists, and state and federal courts alike continue to permit plaintiffs' counsel to reassert identical actions in multiple forums until they achieve a favorable class certification decision. Pet. 18-21. This Court's intervention is needed to resolve the issue and to bring such forum-shopping to an end.

7. The Court of Civil Appeals' choice-of-law inquiry fell short of the Due Process requirements set forth by this Court in *Shutts*.

Respondents also fundamentally misunderstand the Due Process question presented here, contending that Compaq's argument "rests on the assertion that Oklahoma is required to follow Texas' special class action choice of law rule announced in [*LaPray*]." Opp. 20. Not only does Compaq make no such claim, but respondents' characterization of Texas choice-of-law rules is mistaken. The Texas Supreme Court has expressly concluded that the choice-of-law analysis in Texas is not any different in class actions than in individual claims. *See Citizens Ins. Co. v. Daccach*, 217 S.W.3d 430, 442 (Tex. 2007).

In any event, the issue is not whether Texas and Oklahoma apply different choice-of-law rules in class actions. Rather, the Due Process violation occurred here because the Oklahoma courts failed to consider whether Texas has a cognizable interest in the claims of *each individual class member*, and thus

ignored the constitutional restrictions this Court has recognized on the manner in which state courts may conduct the choice-of-law inquiry in multistate class actions. Respondents assert that, although the choice-of-law analysis conducted by the Oklahoma courts "has been described as being undertaken at the 'class level,' it was not so limited." Opp. 7. Respondents, however, cannot provide any support for that claim, pointing only to the Court of Civil Appeals' statement that it in fact considered Texas' relationship to "the litigation." *Id.* (quoting App. 13a.). But that statement simply proves Compaq's point that the Court of Civil Appeals *presumed* the existence of the class, and then considered whether Texas had significant contacts with *the litigation as a whole* rather than with the claims of *each individual class member*. The Court of Civil Appeals' choice-of-law inquiry thus employed precisely the sort of "bootstrap" approach that this Court found deficient in *Shutts*. 472 U.S. at 821.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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